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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1459

UNITED STATES OF AMERICA, ex rel. ERNEST FEELINGS,
Petitioner,

v.

EUGENE LEFEVRE, Superintendent, Clinton Correctional Facility, New York,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

A copy of the opinion of the District Court for the Eastern District of New York (*Weinstein*, J.), dismissing petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 has been annexed to the petition. The decision has not been reported to date.

The Court of Appeals for the Second Circuit (Feinberg, Mulligan and Gurfein, C. JJ.), affirmed the judgment of the

District Court without opinion. The judgment of affirmance was entered on December 21, 1978. An order denying, without opinion, petitioner's motion for reargument was entered on February 22, 1979.

At the state court level, the judgment of conviction was entered on September 15, 1972, following trial by jury before the Honorable Hyman Barshay in the Supreme Court of the State of New York, County of Kings. There is no reported opinion.

The Appellate Division of the Supreme Court, Second Department, affirmed the judgment of conviction, without opinion, by order entered March 19, 1975.* Petitioner's application for leave to appeal to the Court of Appeals of the State of New York was denied on July 21, 1975.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

Should a writ of certiorari issue where the sole question is whether, on the facts of this case, petitioner voluntarily, knowingly and intelligently waived his privilege against self-incrimination and his right to counsel, those facts having been fully explored in hearings below? ....

Statement of the Case

The sole, albeit disguised, objective of the within petition is to have this Court conduct yet another review of the factual finding that petitioner voluntarily, knowingly

* That order also affirmed an order denying petitioner's post-conviction *coram nobis* application to vacate his sentence.

and intelligently waived his privilege against self-incrimination and his right to have retained or appointed counsel.

Petitioner had a pretrial hearing pursuant to *People* v. *Huntley,* 15 N Y 2d 72, 204 N.E. 2d 179 (1965). At the conclusion of that hearing, the state court made extensive findings of fact and conclusions of law that petitioner was properly advised of his rights before he confessed, that he voluntarily waived his right to counsel and his privilege against self-incrimination and that he voluntarily confessed. The jury made its own evaluation of these factual issues and reached the same conclusion. The Appellate Division unanimously affirmed and the Court of Appeals denied leave to appeal.

At the District Court level, on the habeas corpus petition, petitioner bore the burden of demonstrating by convincing evidence that the state court findings were erroneous. *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973); *United States ex rel. John* v. *Casscles,* 489 F. 2d 20 (2d Cir. 1973), cert. denied 416 U.S. 959 (1974). After reviewing the record of the state court proceeding, Judge Weinstein concluded that as to the question of the voluntariness of petitioner's waiver of his rights and the voluntariness of his confession, he had received a full and fair hearing. Under these circumstances and as to these issues Judge Weinstein properly declined to grant an evidentiary hearing. The state court's findings were entitled to a presumption of correctness and the District Court Judge should accept them. 28 U.S.C. § 2254(d); *Townsend* v. *Sain,* 372 U.S. 293 (1963).

Judge Weinstein further concluded, however, based upon his review of the record of the state court proceedings, that there was an issue which the state court had not fully considered, to wit, whether petitioner understood his rights and understood the implications of waiving them. Otherwise stated, whether he had acted knowingly and intelligently. On this issue, petitioner was accorded an

evidentiary hearing. The issue was resolved against petitioner and his petition was dismissed. The Second Circuit unanimously affirmed and denied petitioner's subsequent motion for reargument.

Once again, petitioner seeks to throw open for review the *facts* surrounding his confession. Although the petition makes the novel statement that petitioner "seeks review of a pattern of arrest" in New York homicide cases described by petitioner as the "two-step" process, petitioner never has and is not now mounting a constitutional challenge to a police procedure. The issue is whether on the facts of this case, petitioner has been denied any constitutional safeguards.

Statement of the Relevant Facts*

A. The Crime

On the afternoon of December 1, 1967, three gunmen entered the offices of the Leonard Electric Products Company located in the Bush Terminal Building, 67 34th Street in Brooklyn. They stole approximately $6,000 of the company's payroll. During the course of the robbery, Nathaniel Leonard, the company's president, was shot and killed. A company employee, Harold Abrams, was shot and critically wounded. Based upon descriptions provided by the company's employees, and upon subsequent investigation, petitioner was arrested on January 8, 1968.

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* Petitioner states in the first footnote to page 5 of the within petition that he has gone outside the record by culling facts from trials of his co-defendants held three years earlier. Petitioner's habeas corpus application, however, must be limited to a review of the record made by petitioner at his hearings and trial. This notwithstanding, petitioner establishes no convincing nexus between the supplemental facts pertaining to his co-defendants and the alleged deprivation of his constitutional rights.

B. Circumstances Surrounding Petitioner's Apprehension

The arrest was made by Detectives Frank Caltagirone and Frank Rinaldi of the 68th Precinct. They were assigned to the case on the date of the crime (H. 83).*

On January 8, 1968, at about 2:30 P.M., the two detectives went to a third floor rear apartment in a building located at 330 Greene Avenue in Brooklyn (H. 83-84). They knocked on the door and identified themselves. When no one responded, they forced the door open (H. 85).

The apartment was empty. When the detectives looked out of an open bedroom window, however, they saw that two men were being held at gunpoint by two officers who had been assigned to cover the rear yard (H. 85). The two suspects were petitioner and Willie Brigham.

C. Events Preceding Petitioner's Statement

The two were taken to the 68th Precinct, arriving at about 3:30 P.M. (H. 86). At the precinct, petitioner was asked if he had been on the premises of the Leonard Electric Company on December 1, 1967. Petitioner denied being there. According to the detectives, there was no further conversation with petitioner (H. 87).

At approximately 5:00 P.M. that day, petitioner was placed in a lineup at the precinct. He was identified by one of three Leonard Company employees. At about 5:45 P.M., Detective Rinaldi took petitioner to another lineup at the hospital where Harold Abrams was recuperating (H. 88). Abrams identified petitioner.**

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* The numbers in parentheses preceded by the letter "H" refer to the corresponding pages of the stenographic transcript of the *Huntley* hearing.

** In response to petitioner's application to suppress identification testimony, he was also given a *Wade* hearing. At its con-

(footnote continued on following page)

D. Taking of the Statement

Petitioner was returned to the precinct sometime between 6:00 and 7:00 P.M. (H. 88). At this time, petitioner first expressed to Detective Caltagirone his desire to tell the officers everything (H. 89, 122). Detective Caltagirone thereupon took out a form provided by the Police Department and carried by all officers (H. 90, 91, 103, 104). On the form was printed the constitutional warnings pursuant to the *Miranda* decision. The form also contained blank spaces in which the officer was to record the suspect's responses to each warning (H. 91).

Reading from this form and recording petitioner's responses, the detective advised petitioner of his constitutional rights. The detective told petitioner that he had the right to remain silent and that he did not have to say anything unless he chose to do so. Petitioner answered "yes" that he understood and his answer was recorded by the detective in the space provided. Petitioner was told that anything he said could be used against him in a court of law. When asked whether he understood that, he responded affirmatively. The answer "yes" was recorded. Petitioner was told that he had the right to an attorney present with him during any questioning then or in the future. In addition he was asked if he had an attorney. He answered "yes", the response petitioner had been making to indicate understanding. Petitioner was also told that in the event he could not afford a private attorney, the court would appoint one to represent him. Again petitioner affirmed his understanding (H. 92-95). Finally, petitioner was told that he could telephone an attorney (H. 108). Petitioner did not do so.

(footnote continued from preceding page)

clusion, the court excluded testimony concerning the lineup identifications because no attorney had been present, a requirement since eliminated. See *Kirby* v. *Illinois*, 406 U.S. 682 (1972). However, finding no taint in the identification procedure, the court ruled that the witnesses could make in-court identifications.

Detective Caltagirone then asked petitioner why he was willing to make a statement (H. 95). He replied: "I want to tell the truth because they crossed me" (H. 95). This answer was recorded by the detective on the form (H. 95). Petitioner was next handed the form, told to look it over and asked to sign it. He did so (H. 90, 96-97, 98-99). He then gave the officers a full statement of his participation in the robbery and shootings that had occurred at the Leonard Electric Company on December 1, 1967 (H. 111).

Detectives Caltagirone and Rinaldi wrote the statement down verbatim in their notebooks as petitioner spoke. The statement described petitioner's participation in the robbery and the shootings although endeavored to mitigate the circumstances surrounding the shootings.

Detective Caltagirone testified that the notation on the *Miranda* form which he used for petitioner indicated that petitioner had been advised of his rights at 7:10 P.M. (H. 99-100, 120). The detective acknowledged that the notebook in which the statement had been recorded contained a time notation of "6.4 P.M.," which the detective conceded would indicate that the statement was begun sometime between 6:40 and 6:49 P.M. (H. 124). He adamantly insisted, however, that petitioner had been advised of his rights before the statement was taken (H. 92, 123, 124, 125, 149, 151). Detective Caltagirone concluded that one of the two time notations was erroneous (H. 125, 127).*

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* Petitioner places much emphasis on whether the statement was one continuous narrative or whether some questioning was also utilized. According to petitioner's convoluted reasoning, the *Miranda* warnings could not have been administered at "6.4 P.M." if there had been questioning because the statement could not then have been completed by 7:00 P.M., the approximate time that an Assistant District Attorney was notified to come down to the precinct. The record, however, is entirely consistent with the statement having been completed in 20 to 30 minutes, the approximate time between "6.4 P.M." and 7:00 P.M.

Detective Rinaldi testified that he returned to the precinct with petitioner following the hospital lineup at about 6:30 P.M. (H. 154, 210, 211). The petitioner showed an eagerness to make a statement and so Detective Caltagirone, reading from a form provided by the Police Department, advised him of his constitutional rights (H. 154, 155, 164, 167, 168). Immediately thereafter, the form was handed to the petitioner who signed it (H. 155).

At approximately 6:45 P.M., after the petitioner had been warned of his rights, he made a statement fully outlining his participation in the crime (H. 156, 163, 166, 204-205, 211, 212, 215, 217, 218). Detective Rinaldi noted down the confession as the petitioner spoke (H. 160). The steno book in which he recorded petitioner's confession had a notation that the statement had been given beginning at 6:45 P.M. (H. 157, 169). An additional notation written in the margin next to the statement indicated that petitioner had been "advised of his rights" (H. 158, 160, 169).* Rinaldi testified that he was positive that petitioner had been warned of his rights before he gave the statement (H. 158).

A handwriting expert testified that the signature on the *Miranda* form was that of petitioner. Petitioner testified that he had an LSD induced amnesia and remembered nothing from the date of the crime to a point some two and half years later.

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* Petitioner engages in lengthy speculation that Detective Rinaldi could have written in the marginal notation shortly before testifying since his memo book was in his possession. The fact of possession was placed before the court. The court, however, credited the detective's testimony that the notation was made at the time petitioner made his statement. The memo book also contained the statement, among others, of co-defendant Wilson. That statement had no marginal notation and had been entered into evidence at Wilson's trial without any notation.

E. Events Subsequent To The Statement

At approximately 2:00 A.M. on January 9, 1968, while petitioner was at the precinct being booked, he was stricken with drug withdrawal symptoms. He had not previously exhibited those symptoms while in the presence of Detectives Caltagirone and Rinaldi or Assistant District Attorney Allatin (H. 101).* Petitioner was arraigned that morning at 9:00 A.M., after a short period of hospitalization for the withdrawal. A plea of not guilty was entered and the court ordered that counsel be appointed.

F. Petitioner's Period of Prolonged Hospitalization

On January 17, 1968, petitioner was transferred from the Queens House of Detention to the Kings County Hospital to undergo psychiatric observation. His condition was diagnosed as a "malingering psychosis" which subsequently developed into an induced or hysterical psychosis requiring his commitment to Matteawan State Hospital in March, 1968. He remained confined to Matteawan until 1970 although his hospital records indicated that in the month of his admission he was able to carry out work tasks in a responsible and well-behaved manner. Trial proceedings commenced in December, 1971, leading to the eventual entry of the judgment of conviction on September 15, 1972.

G. Proceedings In The District Court On The Writ

Based upon his review of the state court proceedings, Judge Weinstein concluded that: (1) the issue of whether the *Miranda* warnings were given before petitioner made his statement was fully probed at the state level and the state court's determination was fairly supported by the record; (2) the same conclusion was applicable to the issue of whether petitioner's statement was voluntary, i.e.,

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* Petitioner had been sufficiently competent to tell the Assistant District Attorney that he would not say anything more without an attorney.

whether the statement was the product of free will as opposed to coercion; (3) however, the state court did not adequately focus on whether petitioner's waiver of his rights was done knowingly and intellingently, i.e., whether he understood what his rights were, whether he understood the implications of waiving those rights and whether he had the mental capacity to waive them.

The Court continued that there were indicia in the record of the state court proceedings that the waiver was knowingly and intelligently made: petitioner did make an inculpatory statement; he eventually did invoke his right to remain silent; the police officers did testify that petitioner appeared normal and aware at the time; and, the trial court did make certain findings as to the level of petitioner's ability to comprehend (the ability to understand questions asked of him, to recollect events and to make rational responses). Although the Court considered these factors to weigh heavily against petitioner's claim that he had not knowingly and intelligently waived his rights, the Court was of the opinion that the matter should be tested at a hearing *de novo* because the state court had not adequately focused on the issue.* At the conclusion of the hearing, the Court credited the psychiatric testimony adduced and the expert's opinion that at the time petitioner confessed, he was fully capable of acting knowingly and intelligently.

Reasons for Denying the Writ

The case at bar, shorn of the speculations infused into it by petitioner, raises no issues other than the factual issue, repeatedly tested and scrutinized, of whether petitioner voluntarily, knowingly and intelligently waived his right to counsel and his privilege against self-incrimination.

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* No psychiatric testimony had been introduced at the *Huntley* hearing.

The factual pattern is not complicated. Petitioner was a late suspect in the investigation of the Leonard Electrical Company robbery and shootings. At the time of his arrest with Brigham, he denied involvement. As testified to by the investigating detectives, questioning was not pursued. However, after petitioner appeared in two lineups, and without questioning, he volunteered to give a statement. His statement implicated his subsequent codefendants, some or all whom petitioner believed had "crossed" him. The statement also attempted to divest petitioner of any intent to shoot the several victims.*

Petitioner's statement was preceded by a statement of his rights and petitioner's waiver thereof. This fact was found by both the trial court at the *Huntley* hearing and then by the jury after evaluating the testimony. Petitioner acted normally and spoke coherently. He continued to do so when interviewed by the Assistant District Attorney. He suffered withdrawal symptoms the morning of the next day but was present for arraignment at 9:00 A.M. that morning.

Petitioner's psychiatric history began some two weeks thereafter during the course of his confinement in the Queens House of Detention.* At that time he was diagnosed as a malingerer. Subsequently, however, he was able to induce an hysterical psychosis warranting his commitment to Matteawan State Hospital. In an effort to remove any doubt that no psychological infirmity afflicted petitioner's ability to confess knowingly and intelligently, the District Court held a *de novo* evidentiary hearing on that issue.

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* According to the statement, petitioner's gun discharged accidentally each time he was physically grabbed by a victim.

* Petitioner had never previously been under any form of mental care.

Petitioner has had as many full and comprehensive probes into the alleged denial of his rights as would conceivably be necessary to extract some convincing evidence of a violation. Petitioner should not be permitted to go further through speculation and phylacteric invocations of "two-step" processes that seek to avoid the conclusion that petitioner was accorded all of the safeguards to which he was constitutionally entitled.

POINT I

The issue of whether petitioner confessed voluntarily, knowingly and intelligently was fully probed and developed at the state level and the state court's conclusions were fairly supported by the record.

Pursuant to *People* v. *Huntley*, 15 N Y 2d 72, 204 N.E. 2d 179 (1965), New York's implementation of *Jackson* v. *Denno*, 378 U.S. 368 (1964), the trial court held a hearing on the question of the voluntariness of the inculpatory statement made by petitioner. At the conclusion of this hearing, the trial court found that petitioner had been advised of his rights before he made the inculpatory statement attributed to him; that he was in a normal condition and fully aware of the surrounding circumstances at the time and place he made the statement; and that, therefore, the "prosecution has established beyond a reasonable doubt that [petitioner's] statement in which he is alleged to have confessed to his participation in the commission of the crime was voluntarily made and is therefore admissible in evidence; it would be submitted as a question of fact for the jury to also pass upon the voluntariness of the statement" (H. 262).

Petitioner's challenge to these findings raises a question concerning the weight to be given the trial court's conclusions and whether petitioner is now entitled to an evidentiary hearing into questions of fact that have already been resolved against him in the state court.

Concerning the weight to be given the trial court's conclusions, in a federal habeas corpus proceeding, the purely factual findings of a *Huntley* hearing judge are presumed correct and the petitioner has the burden of demonstrating by convincing evidence that the findings were erroneous. *LaVallee* v. *Delle Rose*, 410 U.S. 690 (1973); *United States ex rel. John* v. *Casscles*, 489 F. 2d 20 (2d Cir. 1973), cert. denied 416 U.S. 959 (1974); *United States ex rel. Regina* v. *LaVallee*, 504 F. 2d 580 (2d Cir. 1974); *United States ex rel. Coleman* v. *Mancusi*, 423 F. 2d 985 (2d Cir. 1970), cert. den. 400 U.S. 842 (1970). In the case at bar, petitioner has not met his burden of demonstrating error in the findings that his confession was voluntary.

(1) Petitioner was advised of his rights before the police took his inculpatory statement.

The following facts emerge from the record. Petitioner was apprehended at approximately 2:30 P.M. on January 8, 1968. After he and the two officers, Caltagirone and Rinaldi, arrived at the police station, the first of two lineups was conducted. Thereafter, petitioner and officer Rinaldi travelled to the hospital where Mr. Abrams, a witness who had been seriously wounded during the robbery, was confined. A second lineup was held at Mr. Abrams' bedside. After the hospital lineup, petitioner and officer Rinaldi returned to the police station, arriving at approximately 6:30 P.M.

Officer Caltagirone testified that upon petitioner's return from the hospital, he asked petitioner if he wanted to tell him what happened and petitioner replied that he wanted to "tell the truth" because his accomplices had "crossed" him. Thereupon, officer Caltagirone read petitioner's rights to him from a written form and asked petitioner, after the recitation of each right, whether he understood that right; petitioner answered "yes" each time and his responses were recorded on the warning form. Both the officer and petitioner then signed the form

(petitioner claimed that the signature was not his, but a handwriting expert testified that it was) and the officer heard and recorded petitioner's statement in a book. In that statement, petitioner admitted taking part in the robbery and shooting Mr. Leonard and Mr. Abrams, but claimed that the shootings were accidental.

An Assistant District Attorney was called to question petitioner further. This time petitioner refused to speak without an attorney present. The next morning petitioner began to exhibit narcotics withdrawal symptoms.

What also emerged from the record was the fact that the form from which petitioner's rights were read to him bore the notation "7:10 P.M." as the time when petitioner was given the *Miranda* warnings. The book in which petitioner's statement was recorded bore the notation "6:4 P.M." as the time when the statement was taken. Officer Caltagirone conceded that "6:4" denoted a time somewhere between 6:40 and 6:49 P.M., but insisted that petitioner was advised of his rights before the statement was taken and that he had made an error in noting the time. Officer Rinaldi, who was present at the time, also testified that petitioner's statement was taken after he had been informed of his rights.

This factual dispute was resolved on the basis of the trial court's perception of the credibility of the various witnesses. Therefore, since there was evidence to support this finding and "[s]ince the credibility of [the] testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses [it cannot be said] that the court's findings were clearly erroneous . . .," even if some other court might have reached another result. *United States ex rel. Fitzgerald* v. *LaVallee,* 461 F. 2d 601, 604 (2d Cir. 1972).

(2) Petitioner's statement was freely and voluntarily made.

The standard of measuring whether a confession was voluntarily given has been defined as whether pressure was exerted upon the petitioner to confess through threats, the infliction of fear or pain, or the making of inducements and promises. *Darwin* v. *Connecticut,* 391 U.S. 346 (1968); *Greenwald* v. *Wisconsin,* 390 U.S. 519 (1968); *Fikes* v. *Alabama,* 352 U.S. 191 (1957). In the case at bar, there was no evidence presented of physical or psychological coercion. Furthermore, the use of any such tactics was specifically denied by both Detectives Caltagirone and Rinaldi.*

The detectives further testified that petitioner preceded his statement with an explanation of why he wanted to confess. He stated that he wanted to tell the truth because his accomplices had crossed him. It was logical for petitioner to have concluded that he was going to take full responsibility for the crime since, aside from Brigham, with whom he was arrested, none of the other participants to the crime appeared to be in police custody. Since the police had been able to find petitioner, it was further reasonable for him to conclude that the others had traded the information for their freedom.

(3) Petitioner knowingly and intelligently waived his privilege against self-incrimination and his right to have retained or appointed counsel at the interrogation.

This argument will be developed under Points II and III, *infra.*

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* Photographs of petitioner at the time he was booked including a photograph of petitioner in the nude constituted corroboration of the witnesses' testimony that no physical force was used (H. 246).

POINT II

The District Court properly limited the scope of the evidentiary hearing to only those issues which had not been adequately developed at the state court hearing.

In *Townsend* v. *Sain*, 372 U.S. 293, 312-13 (1963), this Court stated that "a federal evidentiary hearing is required unless the state-court trier of fact has after full hearing reliably found the relevant facts. *Townsend* v. *Sain's* list of circumstances which mandate the holding of an evidentiary hearing has been incorporated into 28 U.S.C. § 2254(d). According to this subsection, a state court's factual determinations, evidenced by written findings, are entitled to a presumption of correctness in a subsequent federal habeas corpus proceeding unless the existence of one of the *Townsend* categories is established.

As set forth under Point I of this brief, the District Court concluded that petitioner had been accorded a full and fair hearing at the state court level, resulting in reliable findings, that petitioner was advised of his rights prior to confessing and that he confessed freely, without coercion of any sort. A review of the evidence at the *Huntley* hearing fully supports the District Court's interpretation of the comprehensiveness of that proceeding on these issues. Therefore, the Court correctly accepted the facts as found.

The Court was not persuaded, however, that the State Court hearing adequately explored the question of whether petitioner had the mental capacity to knowingly and intelligently waive his rights. Accordingly, a hearing was ordered *de novo* on this issue. On the authority of *Townsend* v. *Sain, supra,* and 28 U.S.C. § 2254(d), the Court properly confined the scope of the hearing to the one issue which required further elucidation.

Concerning that issue, the Court heard expert psychiatric testimony that petitioner was mentally competent at the time he made his statement. The psychiatrist based his opinion upon a personal examination of petitioner in 1971, his review of petitioner's medical records and other circumstances surrounding petitioner. The District Court credited the psychiatric testimony and concluded that the question of waivers knowingly and intelligently made had been established beyond a reasonable doubt.

POINT III

The District Court properly concluded that petitioner voluntarily, knowingly and intelligently waived his right to counsel.

Upon reviewing the evidence at the state court hearing, the District Court found that the issue of petitioner's waiver of his right to counsel had been fully explored, and reliable findings made, to the following extent: (a) that petitioner was advised of his right to counsel before he made his statement; and (b) that when so advised, he declined to exercise his right.

The evidence at the *Huntley* hearing was that Detective Caltagirone read the following to petitioner: "You have the right to have an attorney present with you during any questioning now or in the future. Do you have an attorney?" (H. 93). Petitioner answered "yes", as he had done to indicate understanding in response to the previous statements of his rights.* Caltagirone advised petitioner of his right to telephone an attorney but petitioner did not do so (H. 108). Caltagirone also advised petitioner of his right to a court appointed attorney. Rather, petitioner said that he wanted to make a statement because he had been "crossed".

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* Detective Rinaldi testified that it was *not* his understanding of the answer that petitioner was saying he had an attorney.

Consequently, the evidence at the state court level established both the presentation to petitioner of his right to counsel and his voluntary refusal to exercise it. The following day, at arraignment, the court appointed counsel.

The District Court, having properly relied on the state court's findings to the extent indicated, then went on to hold a hearing to determine whether petitioner had been mentally capable of understanding his right to counsel and understanding the implications of waiving that right. As demonstrated under Point II, *supra*, the evidence supported the Court's finding of mental competence.

POINT IV

Petitioner has failed to meet his burden of demonstrating by convincing evidence that the state court's findings were erroneous.

Petitioner's proof will be treated seriatim:

(1) Delayed arraignment. Petitioner raised the issue of the timeliness of the arraignment as bearing upon voluntariness for the first time on appeal to the Second Circuit. Consideration of the argument was, therefore, precluded by the doctrine of exhaustion of remedies. Petitioner may present to the federal courts only those claims which he has urged before the state forum. 28 U.S.C. § 2254(b)(c); *Picard* v. *Connor*, 404 U.S. 270 (1971); *Wilson* v. *Fogg*, 571 F. 2d 91 (2d Cir. 1978). The state courts were never given the opportunity to rule on whether there was an undue delay in arraignment and whether such delay persuasively supported petitioner's claim of involuntariness.

In any event, the length of time before arraignment, even when unnecessary, does not make a confession involuntary in and of itself. *Crooker* v. *California*, 357 U.S. 433 (1958); *Stroble* v. *California*, 342 U.S. 181 (1957); *United States ex rel. Clinton* v. *Denno*, 309 F. 2d 543 (2d Cir. 1962), cert. denied 372 U.S. 938.

In the case at bar, the facts do not support a claim of undue delay. Petitioner was a late entry into the ranks of suspects for the crime. Immediately after his involvement began crystallizing at the lineups, he stated his willingness to make a statement. Thereafter, events proceeded rapidly. The statement was taken, he was interviewed by the Assistant District Attorney and he was booked. A short period of hospitalization intervened (for withdrawal symptoms) whereupon he was arraigned at 9:00 A.M. that morning.

(2) Speculations unsupported by the record.

Petitioner urges that because certain co-defendants alleged that they were the victims of police intimidation and threats, that the voluntariness of petitioner's confession is thereby circumspect.* However, there was no evidence of improper police tactics having been practiced on petitioner. In addition to the fact that the co-defendants' allegations lack any probative value here, those very allegations were never substantiated. Possessed of an equivalent disregard of fact is petitioner's non sequitur that because the police wanted to obtain confessions from the other suspects they must have violated petitioner's rights in obtaining his confession.

(3) Petitioner's claim that he was under the influence of drugs when he confessed.

The issue raised by petitioner's reference to drug usage and withdrawal symptoms in the early hours of January 9 is whether he had been incapable, because of his physical condition, of giving a voluntary confession. The issue was resolved against petitioner at the state court hearing. The

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* Petitioner refers to the testimony of certain co-defendants during their 1969 trials.

court credited the police officers' testimony that petitioner appeared normal and aware and discredited petitioner's claim that drug ingestion had rendered him incompetent. The court made findings as to the level of petitioner's understanding, taking into consideration his memory, his ability to understand the questions he was asked and his ability to make an accurate statement about his acts. The Court also took into account the fact that petitioner did subsequently invoke his right to silence. The District Court properly accorded the state court's conclusions the presumption of correctness conferred by 28 U.S.C. Section 2254(d). Petitioner has not disputed those findings with convincing evidence to the contrary.*

In conclusion, neither singly nor in tandem do the above components of petitioner's proof convince that the findings that petitioner confessed voluntarily, knowingly and intelligently were anything but correct.

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* Interestingly, petitioner was later to challenge the validity of the *Huntley* hearing on the ground that he was under the influence of drugs then as well. Considering the fact that petitioner coherently testified in his own behalf during the hearing, that argument has not been pursued beyond the initial *pro se* papers.

CONCLUSION

The petition for a writ of certiorari should be denied.

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April 13, 1979

Respectfully submitted,

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